



Defendants counter that the existence and amount of insurance is privileged, relying on Federal Rule of Evidence 501 and the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.104. This assertion of privilege is misplaced as to the HISD for several reasons.

First, a discovery privilege must be raised in a proper fashion to be effective. 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2016.1 (2d ed. 1994). Rule 26 requires that initial disclosures, including any insurance agreements, must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate under the circumstances and states the objection in the Rule 26(f) discovery plan. The Individual Defendants raised such an objection in the Rule 26(f) Joint Discovery/Case Management Plan, requesting that discovery not be allowed as to them until the court has ruled on their qualified immunity defenses. (Dkt. No. 35 at ¶ 10.A). However, HISD made no such objection.

Second, the Texas Tort Claims Act does grant a limited statutory discovery privilege to governmental entities and their employees, but that privilege applies only to claims brought under the Act. Section 101.104(a) states that “Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit *under this chapter*” (emphasis added). Section 101.104(b) adds: “Neither the existence nor the amount of the insurance is subject to discovery.” The Texas Supreme Court has construed Section 101.104 to “prohibit[ ] discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, *under the Act*.” *In re Sabine Valley Center*, 986 S.W.2d 612, 614 (Tex. 1999) (emphasis added); *see also Port of Houston Auth. v. West*, 782 S.W.2d 337, 339 (Tex. App.–

Houston [1st Dist.] 1989) (discovery privilege is limited to litigation under this chapter, even though subdivision (b) does not specifically contain such limitation; entire section must be read as a whole).

Vera has asserted no claims under the Texas Tort Claims Act. The Act waives governmental immunity for claims for limited actual damages under specified circumstances, such as negligence of an employee operating a motor vehicle. § 101.021(1). The Act does not waive governmental immunity for claims “arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.” § 101.057(a). The only state law cause of action specifically pled by Vera is intentional infliction of emotional distress, which is clearly exempted from the Act. The balance of the Complaint appears to be grounded in federal law. Because Vera asserts no claim for which the defendants could be liable under the Act, the discovery privilege is not applicable.

FRE 501 is likewise unhelpful to the defendants. FRE 501 provides that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege ... shall be determined in accordance with state law.” As explained above, Vera brings no claim under the Texas Tort Claims Act. Because Texas law does not extend an insurance discovery privilege to state law claims outside the Act, there is no basis under FRE 501 to import such a privilege here.

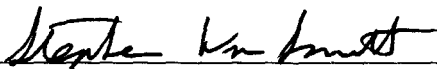
The Individual Defendants also seek protection from the requirements of initial disclosure on the basis of qualified immunity. These defendants have pending motions asserting qualified immunity before the district court. In these motions they have requested a protective order exempting them from their initial disclosure obligations and any discovery requested of them by the Plaintiff. These

motions, which were referred to in the Rule 26(f) Joint Discovery/Case Management Plan, satisfy the demand of Rule 26 to either make initial disclosures or object.

With respect to these Individual Defendants, the motion to compel is premature because a favorable ruling on the qualified immunity issue would relieve them of all discovery obligations. A principal purpose of the qualified immunity doctrine is to shield governmental employees not only from liability, but also from defending against a lawsuit. *See Jackson v. City of Beaumont Police Dept.*, 958 F.2d 616, 620 (5th Cir. 1992). Therefore, until the threshold question of immunity is resolved, discovery should not be allowed to proceed. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991).

Accordingly, Vera's motion to compel disclosure of insurance agreements under Rule 26(a)(1)(D) is GRANTED as to defendant HISD, but DENIED as to the Individual Defendants, without prejudice to Vera's right to re-urge this motion after resolution of the Individual Defendants' qualified immunity motions. HISD is ordered to produce the relevant insurance agreement(s) no later than September 17, 2004.

SIGNED September 10, 2004, at Houston, Texas.

  
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Stephen Wm. Smith  
United States Magistrate Judge